Supreme Court, U.S.
FILED

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001516 APR 2 2001

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

RONALD J. ALLISON & MARTHA J. ALLISON,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, et.al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

PETITIONERS' APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

For the Petitioners:

RONALD J. ALLISON, Pro Se
MARTHA J. ALLISON, Pro Se
390 North 10th Avenue
P.O. Box 661
Forsyth, MT 59327
1-406-356-2904

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Document No.:	Document:
A-1	MEMORANDUM of the Ninth Circuit Court of Appeals three judge panel of Justices Wallace, Fernandez, & McKeown, issued in Ninth Circuit Cause No. 99-35708, on September 26, 2000
A-2	ORDER of the Ninth Circuit Court of Appeals three judge panel of Justices Wallace, Fernandez, & McKeown, issued January 2, 2001
A-3	ORDER of the United States District Court for the District of Montana, Judge Jack Shanstrom presiding, in Cause No. CV-99-BLG-JDS, issued June 29, 1999

APPENDIX "A-1"

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD JESSE ALLISON; MARTHA J. ALLISON

Plaintiffs-Appellants,

v.

CITY OF FORSYTH, Rosebud County, MT; LARRY BURNS, Larry's Service Center, Baker, Montana; UNITED STATES INTERNAL REVENUE SERVICE, Department of the United States of America,

Defendants-Appellees.

No. 99-35708

D.C. NO. CV-99-00025-JDS

MEMORANDUM[1]

Appeal from the United States District Court
for the District of Montana
Jack D. Shanstrom, Chief Judge, Presiding

Submitted September 11, 2000[2]

Before: WALLACE, FERNANDEZ, and McKEOWN, Circuit Judges.

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1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3

2 Because the panel unanimaously finds this case suitable for decision without oral argument, we deny the Allisons' motion for oral argument and deem the motion requesting a longer oral argument moot. *See* Fed. R. App. P. 34(a)(2).

Ronald Jesse Allison and Martha J. Allison appeal pro se the district court's order dismissing defendants Larry Burns and the City of Forsyth based on res judicata and granting summary judgment in favor of the Internal Revenue Service ("I.R.S.") in the Allisons' claims seeking to quiet title and damages in connection with the I.R.S. levy and sale of personal and real property. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo dismissals based on res judicata, *see Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d. 362, 363 (9th Cir. 1993), and summary judgments, *see Margolis v. Ryan*, 140 F3d. 850, 852 (9th Cir. 1998). We may affirm on any basis supported by the record. *See PCCE, Inc. v. United States*, 159 F.3d 425, 427 (9th Cir. 1998). We Affirm.

The district court properly dismissed the claims against Larry Burns and the City of Forsyth based on res judicata given the Montana state court judgment in favor of these parties. *See Palomar*, 989 F.2d at 363.

The district court also properly dismissed Martha Allison's third party suit for wrongful levy under 26 U.S.C. § 7426 because she did not commence the action within nine months of the levy. *See Fidelity & Deposit Co. of Md v. City of Adelanto*, 87 F.3d 334, 335 (9th Cir. 1996).

The district court properly granted summary judgment on the Allisons' quiet title claim under 28 U.S.C. § 2410 because the I.R.S. no longer had an interest in the property when the Allisons commenced their action. *See Hughes v. United States*, 953 F.2d 531, 538 (9th Cir. 1992).

Although the Allisons made general allegations of fraud, their claim under 26 U.S.C.. § 7433 failed because these allegations were not supported by evidence and were not sufficient to state a claim under that section. *See Miller v. United States*, 66 F.3d 220, 222 (9th Cir. 199 5)indicating that Section 7433 allows for a civil action when an I.R.S. officer recklessly or intention-

ally disregards provisions of the I.R.S. Code).

The Allisons contend that the I.R.S. violated their Fourth Amendment right against unreasonable search and seizure because the I.R.S. possessed a writ of entry and not a search warrant. This contention lacks merit. *See United States v. Condo*, 782 F. 2nd 1502, 1504-06 (9th Cir. 1986). Similarly, their additional constitutional contentions challenging the collection of their taxes and the district court proceedings also lack merit. *See Wages v. Internal Revenue Serv.*, 915 F.2d 1230, 1235 (9th Cir. 1990).

The district did not abuse its discretion in denying the Allisons' motions for recusal, *see United States v. Scholl*, 166 F.3d 964, 977 (9th Cir.), *cert. denied*, 120 S. Ct. 176 (1999), and motion for additional discovery under Fed. R. Civ. P. 56(f), *see Bank of Am. v. Pengwin*, 175 F.3d 1109, 1117-18 (9th Cir.), *cert. denied sub nom, Fishing Vessel Owners & Marine Ways v. Bank of Am.* 120 S. Ct. 174 (1999). In addition, the district court properly denied the Allisons' motion for remand for want of removal jurisdiction. *See Audette v. Local 24, Int'l Longshoremen's and Warehousemen's Union*, 195 F.3d 1107, 1111 (9th Cir. 1999).

The Allisons' remaining contentions lack merit.

AFFIRMED.

FILED
SEPTEMBER 26, 2000
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

FILED
JANUARY 16, 2001
LOU ALEKSICH, JR., CLERK
By_____
Deputy Clerk

APPENDIX"A-2"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RONALD JESSE ALLISON; MARTHA J. ALLISON

Plaintiffs-Appellants,

v.

CITY OF FORSYTH, Rosebud County, MT; LARRY BURNS, Larry's Service Center, Baker, Montana; UNITED STATES INTERNAL REVENUE SERVICE, Department of the United States of America,

Defendants-Appellees.

No. 99-35708

D.C.# CV-99-00025-JDS
Montana (Billings)

ORDER

Before: WALLACE, FERNANDEZ, and McKEOWN, Circuit Judges.

Appellants' petition for panel rehearing is denied.

Appellants' motion to recall and stay the mandate is denied as unnecessary.

Appellants' motion to amend, correct, and clarify the official court record filed on December 5, 2000 is denied.

No further filings shall be accepted in this closed appeal.

FILED
JANUARY 2, 2001
CATHY A CATTERSON, CLERK
U.S. COURT OF APPEALS

APPENDIX "A-3"

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

RONALD J. ALLISON; and MARTHA J. ALLISON — Cause No. CV 99-25-BLG-JDS

Plaintiffs

v. ORDER

CITY OF FORSYTH, ET AL.

Defendants

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1. Background

This quiet title action was originally filed in the Montana Sixteenth Judicial District Court, Rosebud County, by Ron and Martha Allison against the City of Forsyth, Larry Burns and Larry's Service Center, United States of America and the IRS, and anyone who might have an interest in the real property at issue. Because the IRS and the United States were named as parties, the case was removed to this Court. There are a variety of motions which are pending.

At the outset the Court notes that this case against the City or Forsyth and Larry Burns is an exact duplicate of a case the Allisons filed against the City of Forsyth and Larry Burns back in 1997 in the Sixteenth Judicial District, Rosebud County. The District Court dismissed the Allisons' cause of action and such dismissal was affirmed by the Montana Supreme Court.

2. Motion for recusal or, in the alternative, for the disqualification of Judge Jack D. Shanstrom from hearing this matter.

The Allisons move under 28 U.S.C. Section 144 and Section 455 for recusal and disqualification of the undersigned. The Allisons base their motion upon the fact that I have ruled against them in several different lawsuits.

Judicial rulings alone almost never constitute a basis for bias or impartiality. Liteky v. United States, 510 U.S. 540, 555 (1994); Pau v. Yosemite Park and Curry Co., 928, F.2d 880, 885 (9th Cir. 1991). The Allisons' motion for recusal and disqualification shall be denied.

3. Defendant Larry Burns' motion to dismiss and request for costs and damages.

Defendant Larry Burns/Larry's Service Center moves to dismiss plaintiffs' complaint, contending the case has been previously tried in Rosebud under Cause No. DV 97-124, and the court found for all the defendants and dismissed the Allisons' complaint.

Attached to the City of Forsyth's motion to dismiss is a copy of a Supreme Court opinion, filed on June 9, 1998, in the Allisons' Rosebud county case. Larry Burns and Larry's Service Center were named as defendants in that quiet title action. In the four-page, unpublished opinion, the Montana Supreme Court affirmed dismissal of Allisons' complaint. The last sentence in the opinion, quoted below, is relevant to Burns' and the City of Forsyth's motions to dismiss.

> Having viewed the allegations in the light most favorable to the Allisons, and accepting the stated facts in their complaint as true, we conclude that the Allisons can prove no set of facts entitling them to relief against

the City or Burns, and that dismissal of the complaint was proper.

This current action against Larry Burns and Larry's Service Center shall be dismissed based upon res judicata. The Allisons litigated the same claim against Larry Burns in state court and lost. They shall not be permitted to relitigate their claim against Burns in this action.

3. The City of Forsyth's motion to dismiss.

The City of Forsyth moves, pursuant to Fed. R. Civ. P. 12(b), to dismiss the complaint for the following reasons: (a) the complaint fails to state a claim upon which relief can be granted against the City of Forsyth; (b) the complaint is barred by the applicable statute of limitations; (c) the complaint is barred by the doctrine of res judicata; and (d) the complaint is barred by the doctrine of collateral estoppel.

Based upon the Montana Supreme Court opinion quoted above, the instant action against the City of Forsyth is likewise barred by the doctrine of res judicata.

4. Plaintiffs' motion for remand from the United States District Court to the Sixteenth Judicial Court.

The Allisons' first contend that the government failed to comply with 28 U.S.C. §§ 1446 (c) (4) and (c) (5). These sections apply only to removal of criminal prosecutions from state court and thus, are inapplicable in the instant situation.

The Allisons also complain that the United States failed to comply with 28 U.S.C. Section 1447(d), which requires the removing party to give notice of such removal to all adverse parties. The Allisons contend that the United States did not give notice to the City of Forsyth or Larry Burns.

In response, the United States first argues that at the time it filed the notice of removal, the co-defendants had not filed a notice of appearance and, therefore, there was no address of record. Second, the United States contends that co-defendants Larry Burns and the City of Forsyth are not "adverse" parties. The United States also argues that even if it failed to give notice to a co-defendant, such failure to give notice is not fatal to the removal of the action because subsequently the United Sates has served the co-defendants, both Larry Burns and the City of Forsyth, with copies of the notice of removal.

Finally, the Allisons claim that this case was improperly removed, "due to a lack of subject matter jurisdiction over both Mr. Allison and over Mr. Allison's real and personal properties." In response, the United States argues that removal jurisdiction includes the right of the United States District Court to determine that a suit against the United States should be dismissed with prejudice for lack of subject matter jurisdiction.

All of the Allisons arguments in support of their motion to remand are without merit. Consequently, the motion shall be denied.

5. Allison's motion to reconsider.

On April 9, 1999, the Court entered an order denying plaintiffs' request for entry of default against the City of Forsyth and Larry Burns. The Court did so because at the time the request for entry of default was filed, both the City of Forsyth and Larry Burns had filed motions to dismiss. The Court found that while these motions were pending, the time within which the defendants must serve a responsive pleading is tolled. Plaintiffs now move for reconsideration of that order on the grounds that while both defendants filed motions to dismiss, they were not timely filed.

The summons served in this case afforded the defendants 20 days in which to answer or otherwise plead. The file reflects that defendant Burns' motion to dismiss was filed on the 20th day after service and is thus, timely. Defendant City of Forsyth's motion was filed on the 22nd day after service and, while technically untimely, it was filed before the plaintiff requested entry of default. Thus, the motion for reconsideration shall be denied.

6. The United States' motion to dismiss or, in the alternative, motion for summary judgment.

Under 28 U.S.C. Section 2410, the United States may be named a party in any civil action or suit in any district court to quiet title to real or personal property on which the United States has or claims a mortgage or other lien. This waiver of sovereign immunity under Section 2410 is strictly limited and it does not apply in situations where, as here, the government has already sold the property and no longer claims any interest in it. Hughes v. United States, 953 F.2d 531, 538 (9th Cir. 1992). Thus, Allisons' case cannot be maintained under 28 U.S.C. Section 2410 because the property has been long since sold.

26 U.S.C. Section 7433 allows a taxpayer to sue for civil damages for certain unauthorized collection actions. As a prerequisite to suit under 7433, however, a plaintiff must exhaust administrative remedies available to him or her within the Internal Revenue Service. Here, Allison has presented no evidence of such exhaustion of administrative remedies.

Finally, 26 U.S.C. Section 7426 allows a person, other than the taxpayer, who claims an interest in or lien on property that has been sold pursuant to an IRS levy, to bring claim against the United States that such property was wrongfully levied upon. Martha Allison contends that the real property that was levied upon and sold was in her name and not the

name of the taxpayer, her husband Ron Allison. Her claim must fail because a claim for wrongful levy must be brought within nine (9) months of the levy on the property. 28 U.S.C. Section 7426(h) and Section 6532 (c) (1). It is undisputed that the levy on the property occurred on March 6, 1997, and this litigation was not commenced until February of 1999, after the statute of limitations had expired. Moreover, in the Allisons' bankruptcy case, Bankruptcy No. 97-12264-7, Adversarial Case No. 98-00102, Judge Peterson determined that Martha Allison "has no legally recognized interest in the real property as nominee" and thus, cannot bring action under section 7426. The government's motion shall therefore be granted.

7. Plaintiff's motion to defer consideration of the United States' motion to dismiss or, in the alternative, motion for summary judgment.

The Allisons move under Fed.R.Civ.P. 56(f) for an order which defers ruling on the government's motion to dismiss/summary judgment in order to enable the plaintiffs to complete discovery, including the taking of depositions or filing of written interrogatories. Allison contends that he seeks to establish through discovery the following: (a) that the IRS assessments against Allison have not been establish and recorded as required by 26 U.S.C. Section 6203; (b) that the required notices of assessment and demand for payment were not issued or properly served upon the plaintiffs for the tax years at issue; (c) that the statutory notices of deficiency were not issued or properly served upon the plaintiffs for the tax years at issue; (d) that a written determination was not made that a substantially higher bid for the subject property could be obtained by conducting the sale outside of the county of seizure; and (e) that a determination was not made establishing the fair market value of the subject property.

The government argues that under Rule 56(f), an opposing party must make clear what information is sought and how it will preclude summary judgment. Garrett v. City and County of San Francisco, 818 F.2d 1515, 1518 (9th Cir. 1987). In addition, an affidavit in support of a Rule 56(f) motion must explain why facts precluding summary judgment cannot be presented.

For the following reasons the government contends that the Allisons have failed to make clear how the information sought will preclude summary judgment and further, why any facts precluding summary judgment cannot be presented. First, the government alleges that all of the information sought has already been provided to the Allisons in their bankruptcy litigation. Second, the issues regarding the procedural regularity of the tax assessments, levies, and sales were addressed in the bankruptcy court adversary proceeding which upheld the assessments and post-petition levies on pension funds and cannot be relitigated in this case. Finally, and more importantly, the facts the Allisons seek to establish through discovery do not address the underlying problem relating to lack of jurisdiction and statute of limitations because the property has been levied upon and sold, The Court concurs with the government's analysis.

8. Plaintiffs' motion to defer consideration of motions to dismiss of defendant City of Forsyth and Larry Burns.

Plaintiffs' move for additional time in which to respond to the motions to dismiss contending that they were never properly served with copies of the motions. Because this action against Burns and the City of Forsyth is barred by res judicata, the Court shall not afford the Allisons any additional time in which to respond to the motions to dismiss.

Based of the foregoing IT IS HEREBY ORDERED:

1. Plaintiffs' motion for recusal or, in the alternative, for disqualification (Doc. No. 11) is DENIED.

2. Defendant Larry Burns' motion to dismiss (Doc. No. 13) is GRANTED.

3. Defendant City of Forsyth's motion to dismiss (Doc. No. 16) is GRANTED.

4. Plaintiffs' motion to remand (Doc. No. 24) is DENIED.

5. Plaintiffs' motion to reconsider (Doc. No. 25) is DENIED.

6. Defendant United States' motion to dismiss or, in the alternative, motion for summary judgment (Doc. No. 26) is GRANTED.

7. Plaintiffs' motion to defer consideration of the United States' motion to dismiss or, in the alternative, motion for summary judgment (Doc. No. 32) is DENIED.

8. Plaintiffs' motion to defer consideration of motions to dismiss of defendant City of Forsyth and Larry Burns (Doc. No. 37) is DENIED.

9. Plaintiffs' causes of action against all the defendants are dismissed with prejudice.

The Clerk shall enter judgment accordingly.

The Clerk shall forthwith notify the parties of the making of this Order.

DONE and DATED this 29th day of June, 1999.

/S/
Jack D. Shanstrom
Chief United States District Judge

FILED
JUNE 29, 1999
LOU ALEKSICH, JR., CLERK
By_____
Deputy Clerk